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No. 03-756

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GONZALO BARRIENTOS, *et al.*,
Appellants,

v.

STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas

APPELLANTS' OPPOSITION TO MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

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Over the course of the last century in Texas, during most of which there were no minority officeholders and minority voters were effectively disenfranchised, the Texas Senate followed a consistent practice of requiring a supermajority vote (2/3 or better) before any legislation would be considered on the Senate floor. Known as the "2/3 Rule", Texas senators used its protections to guard against legislation deemed harmful to their interests and to forge a consensus on legislative priorities. In 2003, eleven senators—the nine minority legislators in the Texas Senate and two Anglos representing overwhelmingly minority districts—attempted to use the protections of the 2/3 Rule to block congressional redistricting legislation. But when it became clear that the 2/3 Rule would prevent a redistricting bill from passing, state officials changed the traditional practice and abandoned the 2/3 Rule.

In the face of this history, and the uncontradicted record below showing the Texas Senate's long-standing use of the 2/3 Rule, the State now denies its existence. The State advances a number of arguments about why there is no such thing as a 2/3 Rule, or why, if there is such a Rule, Appellants' claims about its abandonment are now moot. Against the backdrop of what happened in Texas in 2003, it is not surprising that the State's motion blinks reality. And where forced to confront reality, the State attempts to muddy the waters. But as we show below, when all the rhetoric is stripped away, it is clear that: the Texas Senate changed its long-standing practice or procedure for considering legislation; that it did so in order to pass congressional redistricting legislation; that the State in fact applied the changed procedures in 2003 to enact a new congressional bill; and that no Section 5 preclearance of that change has been obtained.

I. The Texas Senate Has a Long-Standing Practice or Tradition For Considering Legislation, Known as the 2/3 Rule.

Contrary to the false impression the State attempts to create, the Texas Senate has had a supermajority 2/3 Rule for decades. One needs to look no further than trial testimony given by one of the Republican leaders of the Texas Senate, Senator (and former Lieutenant Governor) Bill Ratliff, who recently resigned his senate seat because of the abandonment of the very 2/3 Rule that the State claims is nonexistent. Senator Ratliff, during the trial on the Texas congressional redistricting plan, was asked if redistricting in 2001 or 2003 in Texas played a role in his decision to leave the Senate. He replied: "Well, I won't say it was not a factor, but I'm not going to say it was the determinative factor. As a matter of fact, I would say that the demise of the 2/3 tradition was more of a factor than redistricting was. And I guess there is some overlap there because it—because it happened on that issue." Trial transcript in *Session v. Perry*, December 15, 2003, at pp. 22-23.[1] Indeed, in its decision, the three-judge court in *Session* observed: "In the course of the redistricting bill's passage, Senator Ratliff, a Republican, refused to abandon the two-thirds rule, which does not allow a bill to come to the floor without the support of 21 members, a practice calculated to promote consensus building." *Session v. Perry*, 298 F. Supp. 2d 451, 473 (E.D. Tex. 2004).

Appellants and Appellees largely agree on the operation of the supermajority 2/3 Rule and how it has traditionally

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[1] *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (three-judge court), involved a challenge to Texas's 2003 congressional redistricting plan. Appeals of that decision are pending in this Court, with the Jurisdictional Statements due by April 5, 2004. We have lodged copies of Senator Ratliff's testimony from that case with the clerk of this Court.

been used in the Texas Senate.[2] *See* J.S. at Appendices F, G, and H. There also has been no dispute that whether the legislative tool employed was a blocker bill or some other legislative mechanism, a supermajority (2/3) Rule has been the consistent practice and procedure of the Texas Senate insofar as congressional redistricting legislation has been concerned. Thus, Appellants' expert observed, again unrebutted by Appellees, that "the use of . . . any method to place a bill before the Senate other than by a motion to suspend the rules (which requires a two-thirds vote of members present under the Senate Rules) is a clear deviation from the normal, established Senate practices and procedures." J.S. App. 42a.

II. Abandonment of the 2/3 Rule Was Aimed at Congressional Redistricting Legislation.

The sequence of events that led to the State's decision to abandon the supermajority (2/3) vote requirement in the second and third special sessions in 2003 shows quite clearly that the target of the new procedure was congressional redistricting legislation. During the first session, the 2/3 Rule was in place, and when 11 senators (more than a third of the 31-member Texas Senate) announced they would not allow a congressional redistricting bill to be brought forward (ahead of the blocker bill), the legislation died. As the Lieutenant Governor candidly admitted toward the close of the first special session and just prior to the second, "We didn't have

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[2] Indeed, in the court below, the State of Texas conceded that it has a "tradition" of using a practice or procedure that forces a supermajority 2/3 vote on bills in the Senate if they are taken out of order. *See* Defendants' Motion to Dismiss at 4 (calling the use of a blocker bill a "tradition"); *id.* at 4 n.1 (referring to the blocker bill as an "informal tradition").

the votes to bring it up" and thus he planned to "bypass the 21-vote tradition in the next session." Ex. 14.

Appellants were then faced with a choice. They could attend the second session and allow the abandonment of the treasured tradition in the Texas Senate, or they could resort to the only legislative maneuver available to them: break quorum. As the only senators representing minority districts in the State, the eleven Appellants abruptly left the State to block senate business so that their constituents' rights and interests—which the 2/3 Rule would normally protect—would not be trampled.[3] What all this shows, of course, is that what drove the Texas Senate to abandon the 2/3 Rule in the first place was the fact that they lacked the two-thirds supermajority needed to enact a *congressional redistricting bill* under their ordinary procedures or practices. Indeed, the Governor's proclamation calling the second special session on July 28 listed only one item: "to consider legislation relating to congressional redistricting." Ex. 13. The fact that the second session was called exclusively to address congressional redistricting and that the supermajority (2/3) rule was being abandoned so that such legislation could be considered is what is relevant here for Section 5 coverage purposes.[4] It was only after one of the eleven Appellants

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[3] "Well in excess of 90% of the citizens of Texas who attended public field hearings during June and July 2003 and who took a position on redistricting (more than 6000 Texans in all), indicated that they opposed the Legislature's consideration of congressional redistrricting." Exhibits 1-11 (individual sworn statements of each of the Appellants attached to the complaint). "Because the two-thirds rule is usually considered sufficient protection for minority interests, organized efforts to block Senate action by denying it a quorum of members required to meet are rare." J.S. App. 38a.

[4] All eleven Appellants executed unrebutted sworn declarations below that "[t]he two-thirds Rule is a practice or procedure of the Texas Senate and is designed to protect a significant minority of Senators (i.e., an

decided to return to Texas that the State was able to effectuate its abandonment of the 2/3 Rule and enact a congressional map in the third special session.[5]

In the face of these events, Appellees' denial that there has been a practice of requiring a supermajority under the 2/3 Rule is bizarre.[6] It is reminiscent of the approach taken in the Deep South in the pre-Voting Rights Act days, when many officials argued that their voting procedures were not discriminatory, it was just that blacks kept failing racially neutral literacy tests. Indeed, the playing of such "shell

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excess of one-third) against any piece of legislation that is perceived to be against or harmful to their interests." *See* Exhibits 1-11. And the Appellee Lieutenant Governor said during the first special session that "he didn't intend to do away with a Senate rule that lets 11 senators block a bill from reaching the Senate floor for debate, but said such a rule would likely not be in effect should [Governor] Perry call a second session." Ex. 16.

[5] The State's Motion at 13 n.13 emphasizes that the congressional redistricting bill eventually enacted came over to the Senate from the House, leaving the impression that a supermajority 2/3 vote was not needed because it was a House bill. This is wrong, as it has been the practice of the Texas Senate to treat House bills like Senate bills and take them up only after a vote to suspend the regular order of business (which requires a supermajority vote).

[6] Indeed, just last week, Appellee Lieutenant Governor stated that in an upcoming session on school finance, he would once again use the supermajority 2/3 Rule. When asked why the 2/3 Rule hadn't applied to the third special session in 2003 when congressional redistricitng legislation was at issue, he reportedly said: "Redistricting is partisan and public education shouldn't be." *See* Clay Robison, *Dems May Get Edge on Education Debate; Dewhurst Plans to Reinstate 2/3 Rule*, Hous. Chron., March 24, 2004, at 15.

games" is precisely what led to the enactment of Section 5 of the Voting Rights Act in 1965 in the first place.[7]

If the State and the lower court are correct that changes in the legislative process are beyond the reach of Section 5, then the States will be given a safe harbor to transfer discriminatory conduct previously aimed at voters to disempowering their elected representatives. In this safe harbor, States could chip away at the power of minority voters by adopting new practices that eat away at the power of their elected officials. This would "open[] a loophole in the statute the size of a mountain." *Morse v. Republican Party of Virginia*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring).

Because Section 5 coverage extends to any change affecting "any" voting "standard, practice, or procedure," it follows that any change in the 2/3 Rule applied or directed at redistricting legislation would be subject to the preclearance requirements because it changes both a long-standing "procedure" and a traditional "practice." Appellees elevate formalism over reality by arguing that the formal Senate Rules do not contain such an explicit reference. This Court

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[7] Two of the three members of the three-judge court below also sat on the three-judge court that decided the challenges to the Texas congressional redistricting plan. *See Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (three-judge court). In their decision upholding the congressional map, those two judges stated, "[d]uring the first special session, the House approved a new congressional map, but the Senate failed to do so because its 'two-thirds' supermajority rule permitted the Democrats to block a vote. To break the impasse, Lieutenant Governor Dewhurst announced that he would suspend operation of the two-thirds rule in any future special session considering congressional redistricting legislation." *Id.* at 458. These statements by a majority of the *Sessions* court (and a majority of the court below) flatly contradict Appellees' claim here that there is no 2/3 Rule.

has not countenanced such distinctions in the past, *see, e.g., Georgia v. United States*, 411 U.S. 526, 531 (1973), and it should not do so here. What matters for purposes of Section 5 coverage is whether a practice or procedure has been "in force or effect," 42 U.S.C. § 1973c, not whether the formal rules or state laws expressly provide for or authorize such practice or procedure. *See Young v. Fordice*, 520 U.S. 273 (1997), and *Perkins v. Matthews*, 400 U.S. 379 (1971).

III. The Passage of Other Legislation in the Third Special Session Does Not Moot Appellants' Claim.

Appellees make another argument that defies the reality of what happened here. Appellees contend that the abandonment of the 2/3 Rule, assuming one exists, was not aimed solely at congressional redistricting legislation. Mot. at 12-13. Appellees point out that in the third special session, which began *after* the court below had ruled in this case, no blocker bill was employed and thus the 2/3 Rule was not employed for any of the several pieces of legislation that were enacted, including the radical congressional redistricting bill. According to Appellees, the passage of other bills in the third special session without the traditional 2/3 Rule shows that Appellants' concerns about a 2/3 Rule only being applied to congressional redistricting legislation never materialized and in any event are now moot.

Appellees have given the Court only part of the story, however. It is true that there was no blocker bill in the third special session. But that is precisely why Appellants fled the State just prior to the start of the second session—because they feared the abandonment of the 2/3 Rule. And of course, because there was no 2/3 Rule in effect for the third session, the congressional redistricting bill passed. What Appellees

fail to tell the Court is that, except for three bills that related to congressional redistricting, *all* other legislation passed the senate with a supermajority vote. These three bills were: the congressional redistricting plan bill; a bill to change the primary date so the redistricting plan could be implemented; and a bill codifying fines and sanctions that had been imposed on senators who broke quorum. Thus, the only legislation affected by the abandonment of the 2/3 Rule in the third special session related to congressional redistricting legislation, which all eleven Appellants voted against. Appellees are flat wrong to claim that "Appellants' fears . . . [of] a special [simple-majority] procedure" applicable only to congressional redistricting "proved unfounded." Mot. at 13. In the third special session, legislation relating to congressional redistricting were the *only* pieces of legislation that would *not* have passed the Texas Senate if the supermajority 2/3 Rule had not been eliminated.[8]

IV. This Case is Not Moot Simply Because the State Has Obtained Preclearance of the Congressional Plan or Held Primary Elections Under It.

Appellees also claim that because the United States Attorney General precleared the State's congressional plan, that preclearance carried with it preclearance of the entire process, including the change from a 2/3 Rule to a simple-majority rule, rendering this case moot. Mot. at 10-12, 23-

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[8] The State notes that in the 1971, 1981, 1991, and 2003 sessions, the final redistricting plan enacted did not receive a 2/3 majority when enacted. Mot. at 16-17. They also note that the use of the blocker bill was not required in these sessions. *Id.* at 15. These points are irrelevant, as the *practice* followed by the Texas Senate in all of those years (except, of course, 2003) required a supermajority vote in order to allow congressional redistricting legislation to be considered.

25. Neither the State's submission letter nor the preclearance letter issued by the Department of Justice (DOJ) contains any statement that the State was seeking preclearance of the change to the 2/3 Rule or any other change in the redistricting *process*. Quite to the contrary, the State's submittal letter to DOJ—which the State failed to include in its Appendix—expressly stated that "[t]he procedure for the adoption of the change is *not* subject to preclearance." Attached hereto at 9a.

Apparently to show that DOJ approved the abandonment of the 2/3 Rule, Appellees at several points put quotation marks around the phrase "plan and the process," suggesting either that the State specifically submitted its redistricting process (including the change from a 2/3 Rule) when it submitted its congressional map for preclearance, or that DOJ precleared both the plan and process when it issued its controversial preclearance letter.[9] See, *e.g.*, Mot. at 10-11. For example, Appellees state that the Department of Justice's "December 19 preclearance of both the 'plan and the process' is entirely conclusive." *Id.* at 11. Here again, use of the quotation marks around the phrase 'plan and the process' might lead one to conclude that DOJ's preclearance letter contained such a phrase. In fact, it did not. *See* Mot. at App. E. In these circumstances, Texas neither sought nor obtained preclearance for the shift from a supermajority 2/3 Rule to a simple-majority rule for enacting congressional redistricting legislation.[10]

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[9] *See, e.g.*, Dan Eggen, *Democrats Won't Get Justice Memo*, Wash. Post, Jan. 22, 2004, at A23.

[10] This Court should give no deference to DOJ's erroneous interpretation that the change in the 2/3 Rule is not subject to Section 5 preclearance. DOJ's decision relied exclusively on this Court's decision in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992). As explained in the

Appellees' other mootness argument is that the third special session has expired, primary elections have been held, and Appellants' Section 5 claims, therefore, "have already passed into history." Mot. at 9. That is wrong. *See Morse v. Republican Party of Virginia*, 517 U.S. at 235 n.48 (rejecting a claim that a Section 5 challenge to the collection of a fee at a political convention was moot because the convention had been held). Furthermore, plaintiffs' complaint sought an injunction barring the abandonment of the 2/3 Rule unless and until preclearance was obtained. J.S. App. 24a. That preclearance has not occurred. The redistricting plan enacted in the special session using the unprecleared change lives on and will remain in place for the rest of the decade absent either judicial intervention or yet another round of mid-decade redistricting by the State. The illegality is ongoing, and the Section 5 claims are not moot.[11]

CONCLUSION

This Court should summarily reverse the District Court's judgment, or alternatively, note probable jurisdiction.

Jurisdictional Statement at 12-15, that decision is plainly distinguishable from this case.

[11] Consider the following hypothetical. Assume the State adopted a rule that only Senators representing majority-Anglo districts could vote on congressional redistricting bills. A redistricting plan is then enacted using this discriminatory procedure and is precleared. Clearly, the enactment of such a plan and the conduct of elections under it would not moot claims brought by the minority officeholders that they were denied their rights under Section 5, Section 2, or the United States Constitution. In the case before this Court, the procedures used to enact Texas's most recent congressional map never underwent preclearance. A live controversy remains because those illegal procedures produced a plan that will govern congressional elections in Texas for the rest of the decade.

Respectfully submitted.

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APPENDIX

October 20, 2003

EXPEDITED CONSIDERATION REQUESTED

Mr. Joseph D. Rich
Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: Submission under Section 5. Voting Rights Act of House Bill 3, Chapter 2, 78th Legislature, Third Called Session, 2003.

Dear Mr. Rich:

The Texas Legislature has enacted House Bill 3, Chapter 2, 78th Legislature, Third Called Session, 2003 (the "Act"), which concerns the apportionment of the State of Texas into congressional districts.

Expedited Consideration:

Pursuant to 28 C.F.R. § 51.34, the State of Texas is requesting expedited consideration of the enclosed Act which will affect the 2004 primary election for congressional candidates. The filing period begins December 3, 2004. Expedited consideration is requested to ensure that candidates have sufficient time to file and that county election officials have sufficient time to prepare for the election.

Contents of Submission:

Pursuant to the requirements of 28 C.F.R. § 51.27 and § 51.28, the following information is submitted with respect to the Plan:

(a) A copy of the Act is attached and incorporated by this reference as Exhibit "A" as if fully set forth at length.

(b) The Act that is replaced is the court-imposed plan drawn by a three-judge federal panel in *Balderas, et al. v. Texas, et al.*, No. 6:01 CV-158, slip op. (E.D. Tex. Nov. 14, 2001) (per curiam), *aff'd mem.* 122 S.Ct. 2583 (2001). The opinion and judgment in *Balderas v. Texas* can be found at *http://gis1.tlc.state.tx.us/static/pdf/opinion.pdf* and *http://gis1.tlc.state.tx.us/static/pdf/judgment.pdf*, respectively.

(c) The Act was enacted to comply with the Texas constitutional requirement that the State apportion its congressional districts after the publication of the United States decennial census. Tex. Const. art. III, § 28. The Act was also enacted to comply with Article I, Section 2, Clause 3 of the United States Constitution and Section 2 of the Fourteenth Amendment which provides that congressional representatives must be apportioned among the states according to their respective populations. U.S. Const. art. 1, § 2, cl. 3, amended by U.S. Const. amend. XIV, § 2.

(d) The submitting authority is the Honorable Geoffrey S. Connor, Secretary of State of Texas, in his capacity as chief elections officer of Texas. The Secretary of

State's office may be reached at P.O. Box 12060, Austin, Texas 78711-2060, (512) 463-5650.

(e) Not applicable.

(f) Not applicable.

(g) The authority responsible for the passage of the Act was the Texas Legislature.

(h) The Act was adopted pursuant to the provisions of Tex. Const. art. III, § 28, a copy of which is attached and incorporated by this reference as Exhibit "B" as if fully copied and set forth at length. The pertinent constitutional provision can also be found on-line at: *http://www.capitol.state.tx.us/txconst/sections/cn00300-002800.html.*

(i) The Act was signed in the House of Representatives of Texas on October 12, 2003, and in the Texas Senate on October 12, 2003. The Act was signed by Governor Rick Perry on October 13, 2003. A list of actions in both the House and Senate is attached as Exhibit "C".

(j) The Act takes effect and will apply to the election of the members of Congress beginning with the primary and general elections in 2004.

(k) The provisions of the Act have not been implemented.

(l) The changes in the Act will affect the entire jurisdiction of the State of Texas.

(m) The Act will not affect members of any racial or linguistic minority differently from the way the

general public is affected. The Act does not have the intent and will not have the effect of diluting the voting strength of any racial or linguistic minority. For further information regarding the effect of the Act on minorities, you may contact any of the following minority group members residing in the jurisdiction who can be expected to be familiar with the proposed change or who were active in the political process:

The Honorable Ron Wilson
State Representative - House District 131
Member, House Redistricting Committee
Westbury Square Professional Building
5322 W. Bellfort, Suite 104
Houston, TX 77035
(713) 885-0102

The Honorable Vilma Luna
State Representative – House District 33
Member, House Redistricting Committee
4525 Gollihar, #200
Corpus Christi, TX 78411
(361)854-9816

The Honorable Michael L. Williams
Commissioner, Railroad Commission of Texas
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Black Republican Council of Texas
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Margaret Moran
State Director, Texas League of United Latin American Citizens (LULAC)
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San Antonio, TX 78201
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The Honorable Rick Morales
Mayor of Donna, Texas
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Gary Bledsoe
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(n) The reason for the changes provided for in the Act is that Article III, Section 28 of the Texas Constitution and Article 1, Section 2 of the U.S. Constitution requires the State to apportion the State's congressional districts after the publication of the federal decennial census. The changes are also necessary to comply with the "one person, one vote" requirement of the U.S. Constitution.

For a more in-depth analysis as to the reasons for the particular changes in the Act, we have attached a narrative of the federal Voting Rights Act consideration in particular areas. The narrative was prepared by the Texas Attorney General's office, and is attached and incorporated by reference as Exhibit "D" as if fully copied and set forth at length.

(o) As of Friday, October 17, 2003, a total of ten past and pending lawsuits have been filed in Texas in 2003 relating in some way to congressional redistricting. Copies of relevant case pleadings and other proceedings from these cases are available on a CD-ROM labeled "redistricting-related pleadings," that accompanies this submission.

As a preliminary matter, *Balderas v. Texas* is the lead case from 2001 that resulted in the current benchmark plan drawn by a three-judge federal panel.

> Civil Action No. 6:01-CV-158, *Balderas, et al. v. State of Texas et al.*, in the United States District Court for the Eastern District of Texas, Tyler Division. The November 14, 2001 per curiam slip opinion, aff'd mem., 122 S.Ct. 2583 (2002), while included on a CD-ROM accompanying this submission, can also be found at *http://gis1.tlc.state.tx.us/static/pdf/opinion.pdf*, and the court's final judgment can be found at *http://gis1.tlc.state.tx.us/static/pdf/judgment.pdf*. The trial transcript is also included on the accompanying CD-ROM.

Four federal court actions were filed in mid-October 2003, subsequent to the Legislature's final passage of Plan 1374C, seeking relief against the new congressional redistricting plan.

> Civil Action No. V-03-124, *GI Forum of Texas v. State of Texas and [Governor] Rick Perry*, in the United States District Court for the Southern District of Texas, Victoria Division.
>
> Civil Action No. 2:03-CV-354. *Session, et al. v. [Governor] Rick Perry, et al.*, in the United States District Court for the Eastern District of Texas, Marshall Division.
>
> Civil Action No. 2:03-CV-356. *Jackson, et al. v. State of Texas, et al.*, in the United States

District Court for the Eastern District of Texas, Marshall Division.

Civil Action No. 6:01-CV-158, *Balderas, et al. v. State of Texas, et al.*
Civil Action No. 6:01-CV-218, *Mayfield, et al. v. State of Texas, et al.*
Civil Action No. 6:01-CV-231, *Manley v. State of Texas, et al.*

Note: These various plaintiffs, all prior litigants from 2001, have recently filed a joint pleading in the United States District Court for the Eastern District of Texas, Tyler Division. Moreover, the pleading filed under the *Balderas* caption and case number purports to continue the completed litigation from 2001–02 – *see* links above to the court's opinion and final judgment – that resulted in the court-drawn benchmark plan (though neither the court's opinion nor its final judgment assert ongoing jurisdiction over future congressional redistricting in Texas). The State has filed a "Motion for Clarification of Continuing Jurisdiction" with the three-judge panel in *Barrientos v. Texas*, a recent 2003 federal case challenging redistricting efforts on statutory and constitutional grounds, to determine which court of the various federal courts will have dominant jurisdiction over 2003 redistricting litigation.

Prior to the passage of Plan 1374C, there were two state court actions relating generally to the duty of elected lawmakers to attend legislative sessions and the State's authority to compel their attendance.

Cause No. GN 302801, *Van de Putte, et al. v. Lieutenant Governor David Dewhurst, et al.*, in the 98th Judicial District Court of Travis County, Texas.

No. 03-0726, In re *Rick Perry, Governor of the State of Texas, and David Dewhurst, Lieutenant Governor of the State of Texas and President of the Texas Senate, Realtors*, in the Supreme Court of Texas.

Also prior to passage of Plan 1374C, there were two federal court actions asserting various Voting Rights Act and constitutional challenges to the redistricting process and to the State's attempt to compel the attendance of absent legislators.

Civil Action No. 03-CV-68, *Raymond v. State of Texas, et al.*, in the United States District Court for the Southern District of Texas, Laredo Division.

Civil Action No. L-03-113, *Barrientos, et al. v. State of Texas, et al.*, in the United States District Court for the Southern District of Texas, Laredo Division (three-judge panel).

(p) The procedure for the adoption of the change is not subject to preclearance. Previous apportionment of the State into congressional districts pursuant to the

2000 federal census figures was adopted by a three-judge federal panel and not subject to preclearance.

Pursuant to the requirements of 28 C.F.R. § 51.28, the following is submitted with respect to the Plan:

Brief explanation of the Census Bureau's Race and Ethnicity Categorizations

The State of Texas has used the P.L. No. 94-171 population data from the April 1, 2000, decennial census court for redistricting. By April, 1, 2001, the Census Bureau delivered total and voting age (the number of persons age 18 and over) population data by race and ethnicity for all census geographic units in the state for use in redistricting. Other census data items are made available later in the decade as they are processed.

The State of Texas groups the population data into five race and ethnicity categories for redistricting modeling and reporting: Black, Hispanic, Black + Hispanic, Anglo, and Other. "Black" encompasses all people identifying themselves as Black, African American, or Negro on the census questionnaire, even if they also identified themselves with other racial/ethnic groups. "Hispanic" encompasses all people identifying themselves as Spanish/Hispanic/Latino, whatever their race. "Anglo" includes all people who selected "White" as their only race and not Spanish/Hispanic/Latino. "Black + Hispanic" is a combined total of all those identifying themselves as Black and all of those identifying themselves as Hispanic, adjusted so that those identifying themselves as both Black and Hispanic are not counted twice. "Other"

encompasses everyone who does not fall into any of the four classifications described above.

PLAN01151C is the current (108th U.S. Congress) congressional districts plan, and PLAN01374C is the congressional districts plan enacted by the Texas Legislature on October 10, 2003. Both plans contain 32 districts.

(a) Demographic information.

(1) Reports (RED337) evidencing the total population and voting age population before and after the change by race and language group are enclosed and incorporated by this reference in Congressional Plan Box 1 as if fully copied and set forth at length. Note: The comparison data in this section is by incumbent name rather than district number. (Note: on paper and on CD-ROM).

(2) Reports (RED215) evidencing the number of registered voters and the percent of Spanish surname registered voters by voting tabulation district (VTD) before and after the changes are enclosed and incorporated by this reference in Box 1 as if fully copied and set forth at length. The percent of Spanish surname registered voters is derived by running the Spanish surname computer tape against the statewide voter registration master file. (Note: on CD-ROM only).

We do not collect information regarding race in voter registration; therefore, we are unable to provide information regarding the number

of African Americans who are registered voters.

(3) No estimates were relied upon in connection with the adoption of the change.

(4) Demographic data is based on the Bureau of the Census Public Law 94-171 file.

(5) The blkcongress.csv file (included in the Shapefiles folder reference below) contains the census block to district assignments in the prescribed format for the current congressional district (PLAN01151C) and the congressional districts enacted by the Legislature (PLAN01374C).

(b) Maps.

(1) Maps evidencing current and new boundaries of the congressional districts are enclosed and incorporated by this reference in Congressional Plan Box 1 as if fully copied and set forth at length.

(2) Maps evidencing current and new boundaries of the congressional districts and showing the location of racial and language minority groups are enclosed and incorporated by this reference in Congressional Plan Box 1 as if fully copied and set forth at length. These maps include a statewide map shaded by race/ethnicity at the county level and maps of each split county shaded by race/ethnicity at the VTD level for the following categories:

i. Black Total Population
ii. Black Voting Age Population
iii. Hispanic Total Population
iv. Hispanic Voting Age Population
v. B+H Total Population
vi. B+H Voting Age Population
vii. Spanish Surname Registered Voters

(3) Maps evidencing current and new district boundaries with natural boundaries are enclosed and incorporated by reference in Congressional Plan Box 1 as if fully copied and set forth at length. Maps of each split county are included.

(4) Maps evidencing current and new district boundaries with city boundaries are enclosed and incorporated by reference in Congressional Plan Box 1 as if fully copied and set forth at length. Maps of each split county are included.

All maps referenced above have been provided in duplicate. The Congressional Plan does not adopt any changes to the locations of any polling places, voter registration sites, or voting precinct boundaries: therefore, no such maps are included.

(c) Not applicable.

(d) Election returns, election related data and other plan reports, shapefiles, the block equivalency file, and a table of contents are accompanying this submission.

Some reports are also submitted on paper, as noted. The information is indexed as follows:

(1) **Election Data folder**

readme.txt – describes the data in the other files
candidate.dbf – contains candidate names, office, race/ethnicity, and votes received
returns.zip – votes cast by VTD for all elections and offices (this file is in dbf, zipped)
voterreg.dbf – voter registration data by VTD, including election, county/VTD, total voter registration, and Spanish Surname and Non-Spanish Surname voter registration

(2) **Reports folder**

i. Election Reports folder

PLAN01151C Election Reports – RED225 – by district report of election returns by year for each candidate for all-statewide contests and districted contests and including local contests in the six large metropolitan counties (Note: on CD-ROM only)
1992, 1994 – general election
1996, 1998, 2000, 2002 – democratic and republican primaries and runoffs and general election

PLAN01374C Election Reports – same information as above

ii. Plan01151C report packet.pdf – redistricting reports consisting of:
RED100 – Population Analysis with County Subtotals
RED140 – Split Cities and CDPs
RED200 – Population and General Election History
RED310 – Unassigned Geography
RED315 – Compactness
REC350 – Incumbents by District

(Note: on paper and on CD-ROM)

iii. Plan01151C voter reg by VTD.pdf – RED215 report listing total and percent Spanish surname voter registration; turnout total and turnout/registered voters; statewides for Democrats and Republicans (statewides is a weighted average of the results of all general election statewide contested contests in that general election); and the number and percent voters for the 2002 general election governor contest for all VTDs in the state by district. (Note: on CD-ROM only).

iv. Plan01374C report packet.pdf – redistricting reports listed above (ii) for Plan01151C, with two additional reports (Note: on paper and on CD-ROM) that compare the plan enacted by the Legislature with the current plan:

RED337 – Two Plan Comparison by Incumbent (with the number and percent voters for the 2002 general election lieutenant governor contest) RED340 – Plan Overlap Analysis, showing the percent of the current districts that make up the new districts.

v. Plan01374C voter reg by VTD.pdf – RED215 report – same as file description (iii) for Plan01151C.

(3) **Shapefiles folder**

i. ESRI shapefiles for all public congressional plans prepared for the Legislature – includes a Table of Contents listing the plan names and dates the plans were created.

ii. blakcongress.csv – the block equivalency file containing the current congressional districts and the congressional districts enacted by the Legislature.

iii. project.txt – the projection used for the shapefiles.

(e) Not applicable.

(f) Publicity and Participation.

(1) Senate Publicity and Participation

The Texas Senate engaged in significant publicity and invited public participation in the redistricting process. The Senate Committee on Jurisprudence conducted seven regional hearings and met seven times in Austin during the First Called Session alone. During the Third Called Session, the Committee met twice in Austin.

i. Regional Hearings

Notice and Participation

After learning that the First Called Session was to begin on June 30, 2003, the Senate Committee on Jurisprudence planned a series of seven regional hearings throughout the State of Texas. Upon consulting with both Democrat and Republican Committee members, the Committee scheduled regional hearings in five cities: Laredo, San Angelo, McAllen, Houston and Dallas. These cities were selected because these areas had the greatest likelihood of being impacted by changes to the congressional districts. Two cities, Corpus Christi and Waco, were added later to accommodate specific requests.

At each of the public hearings, witness affirmation cards were available in

English and Spanish where each person registered his or her position on redistricting and indicated whether he or she wished to testify.[1] Each individual who wished to testify was given an opportunity to do so, which required the Committee members and staff, on several occasions, to stay late into the evening or early hours of the morning. The Committee also provided English and Spanish translation services at each of the regional hearings. The existence of these services was announced regularly during each of the hearings.

Prior to the holding of each hearing, the Committee purchased an advertisement in the local major newspaper to publicize the Committee's meeting in that particular location. Advertisements were also placed in Spanish-language newspapers in some markets. Copies of these advertisements are enclosed in Texas Senate Box 1.

In addition to the advertisements, the Texas Legislative Council assisted the Committee in distributing notice of the regional hearings as follows:

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[1] The Committee took testimony on redistricting in general during the regional hearings. There were no maps provided for discussion other than the map drawn by the federal panel and in place at that time (PLAN1151C).

- Posted the notice in English and Spanish on the Legislative Council redistricting website;

- Faxed the notice to members of Congress (except Rep. Ron Paul, whose office requested e-mail, and Rep. John Culberson, whose fax machine was out of order);

- Mailed the notice to interested parties (English and Spanish copies were mailed to interested Hispanic organizations);

- Faxed Spanish and English copies of the notice to the Hispanic media; and

- Mailed and faxed the notice to the Vietnamese media.

A list of the Legislative Council's contacts and a copy of the notice are enclosed in Texas Senate Box 1.

Testimony at each regional hearing was recorded by a certified court reporter. Copies of those transcripts can be found at the Senate Committee on Jurisprudence website at *http://www.senate.state.tx.us/75r/Senate/commit/c550/c550.htm*. Also found at this website are the minutes from

each of the hearings, which include a list of all witnesses, those testifying and those wishing only to register a position. Copies of the minutes can also be found in Texas Senate Box 1. Additionally, written testimony or other hand-outs provided to the Committee from all of the hearings are included in Texas Senate Box 1.

Laredo, Texas

The first hearing was held on Saturday, June 28, 2003, in Laredo, Texas at Texas A&M International University. This location was selected by the local senator, Judith Zaffirini, a Hispanic Democrat. During this hearing which lasted for approximately five hours, the Committee received approximately 114 witness affirmation cards and heard testimony from all witnesses who desired to speak.

San Angelo, Texas

The second hearing was held on Monday, June 30, 2003, in San Angelo, Texas at Angelo State University. This location was chosen by the local senator and Chairman of the Committee, Robert Duncan, a rural Anglo Republican. During this hearing which lasted for approximately four and a half hours,

the Committee received approximately 166 witness affirmation cards and heard testimony from witnesses desiring to speak.

McAllen, Texas

The third hearing was held on Tuesday, July 1, 2003, in McAllen, Texas at the McAllen City Hall. The location of this hearing was determined by the local senator, Juan "Chuy" Hinojosa, a Hispanic Democrat. This public hearing lasted for approximately five and a half hours and each individual who wished to testify was given the opportunity to do so. The Committee received approximately 355 witness affirmation cards.

During the McAllen hearing, community activists (from Corpus Christi) disrupted the meeting in a manner that temporarily prohibited the Committee from taking testimony. After discussion and negotiation, the activists agreed to stop the disruption and the Committee agreed to hold a hearing and take testimony in Corpus Christi. Thereafter, a hearing was scheduled in Corpus Christi for July 7, 2003 (see below).

Houston, Texas

The fourth hearing was held on Wednesday, July 2, 2003, in Houston, Texas at Cesar Chavez High School located at 8501 Howard Drive. The local senator, Mario Gallegos, a Hispanic Democrat and Vice-Chair of the Committee, selected this location. This public hearing lasted for approximately nine hours and each individual who wished to testify was given the opportunity to do so. The Committee received approximately 285 witness affirmation cards.

Corpus Christi, Texas

The fifth hearing has held on Monday. July 7, 2003, in Corpus Christi, Texas at the Solomon Ortiz Convention Center. Senator Juan "Chuy" Hinojosa hosted the Committee at this location as well. The Committee received approximately 255 witness affirmation cards during the hearing which last for approximately seven and a quarter hours. Each witness who wished to testify was given the opportunity to do so.

Dallas, Texas

The sixth hearing was held on Tuesday, July 8, 2003, in Dallas, Texas at the University of North Texas

System Center. This location was specifically chosen by Senator Royce West, an African-American Democrat who is also a member of the Committee. This hearing was originally scheduled for Monday, July 7th; however, at the request of the Dallas minority community, the hearing was moved to Tuesday to accommodate the funeral of Reverend Gregory Spencer. This public hearing lasted for approximately eleven and a half hours and each individual who wished to testify was given the opportunity to do so. The Committee received approximately 866 witness affirmation cards.

Senator West, in choosing the location of the hearing, based his decision on past attendance patterns. However, the attendance level in Dallas was much greater than the Committee had previously expected; thus it was necessary for the Committee to work with the fire marshal to alleviate overcrowding. Two overflow rooms were ultimately provided with audio and/or video links to the Committee hearing. Despite this inconvenience, all members of the public were encouraged and were given the opportunity to testify.

Waco, Texas

At the request of Committee member, Senator Kip Averitt, an Anglo Republican, the last hearing was held on Wednesday, July 9, 2003, in Waco, Texas at the Baylor University School of Law. The Committee received approximately 579 witness affirmation cards and heard testimony from any witness who requested to testify. The hearing lasted approximately eleven and a half hours.

ii. **Austin Hearings**

In addition to the seven regional hearings, the Senate Committee on Jurisprudence held nine hearings in Austin. The first seven were held during the First Called Session on the following dates: July 14, 15, 16, 17, 18, 21, and 22. All of these hearings were held in the Auditorium of the Capitol Extension. Each hearing was posted for public notice in the same manner as all other legislative hearings and consistent with the Rules of the Texas Senate. These postings can be found on the Senate Committee on Jurisprudence website at *http://www.senate.state.tx.us/75r/Senate/commit/c550/c550.htm*. The Committee received witness affirmation cards from approximately 451 witnesses. All witnesses who

wished to testify during these seven hearings were given the opportunity to do so.

At the hearings on July 14-16, 2003, the Committee took testimony on redistricting in general and on House Bill 3. No Senate maps were presented for discussion until July 17, 2003, when Senator Todd Staples laid out PLAN 1313C. On July 18, 2003, the Committee also discussed PLAN 1314C by Senator Jeff Wentworth. In response to public testimony and senators' questions and concerns, at the July 21st hearing, Senator Todd Staples laid out two additional plans, PLAN 1324C and PLAN 1325C. Finally, on July 23, 2003, Senator Todd Staples laid out a Committee Substitute to H.B. 3 (PLAN 1327C).

On July 23, 2003, the Committee voted out Senator Todd Staples' Committee Substitute to H.B. 3 (PLAN 1327C) by a vote of 4 to 3. The First Called Session expired prior to consideration of Committee Substitute to H.B. 3 on the Senate floor.

iii. **Second Called Session**

The Second Called Session began on July 28, 2003. Due to the lack of a quorum, neither the Senate as a whole,

nor the Jurisprudence Committee, took any action regarding redistricting.

iv. **Third Called Session**

The Third Called Session began on September 15, 2003. Once again, the redistricting bills were referred to the Jurisprudence Committee. The Committee heard testimony on Senate Bill 1 on September 17, 2003. Its author, Senator Todd Staples, explained the map and was thoroughly questioned by the other members of the Committee. The Committee received approximately 58 witness affirmation cards and each witness who desired to testify was given the opportunity to so do. The bill was left pending waiting for the House Bill (H.B. 3) to be received by the Senate and referred to the Committee.

On September 19, 2003, the Committee considered Senator Staples' Committee Substitute to H.B. 3 (CSHB 3). Senator Staples' substitute map was virtually identical to the map he had laid out as S.B. 1 with a few minor changes. No public testimony was taken as no significant changes had been made to the map. The Committee voted out C.S.H.B. 3 by a vote of 4 to 3.

C.S.H.B. 3 was taken up by the full Texas Senate for debate on second reading on September 23, 2003. The bill was finally passed the next day with a vote of 18 to 12. The Texas House of Representatives refused to concur in the Senate amendments and the bill was sent to a conference committee. The Conference Committee Report was printed and distributed on October 9 ,2003 and was considered by the full Senate on October 10, 2003. The Conference Committee Report for C.S.H.B. 3 was adopted by the Texas Senate on October 12, 2003 by a vote of 17 to 14.

v. **Submitted Materials**

The redistricting record compiled by the Senate Committee on Jurisprudence consists of many items, some of which are referenced herein and are available on the Committee's webpage (e.g. hearing transcripts, audio recordings). In addition to those items, the following documents are being submitted.

- Copies of the regional hearing notices (Texas Senate Box 1);
- Copies of the hearing minutes with witness lists (Texas Senate Box 1);

- Copies of memoranda from the Legislative Council outlining notice activities (Texas Senate Box 1);
- Copies written testimony received by the Committee at the public hearings (Texas Senate Box 1);
- Copies of correspondence received by the Committee or its members, the Lieutenant Governor's Office and other senators (Texas Senate Boxes 1 & 2); and
- Copies of other relevant documents on redistricting (Texas Senate Box 1).

(2) **House Publicity and Participation**

There was a large amount of both publicity and participation in the Texas House congressional redistricting process.

i. **House of Representatives, 78th Regular Session**

On January 30, 2003, Speaker Tom Craddick announced the appointment of the members of the House Committee on Redistricting.

On February 11, 2003, Chairman Joe Crabb requested an official opinion from Attorney General Greg "about the Texas Legislature's legal rights

and responsibilities in connection with congressional redistricting following the 2000 census." (Request No. 0017-GA). On February 14, 2003, OAG Opinion Committee Chair Nancy Fuller contacted a list of interested parties, asking for briefs to be submitted by February 14, 2003. On February 18 and 19, Ms. Fuller contacted additional parties for briefs. Then, on February 20, the deadline for the briefs was extended via fax to March 7, 2003. On April 23, 2003, Attorney General Greg Abbott delivered his formal opinion, which is available on-line at *http:/www.org.state.tx.us/opinopen/opinions/op50abbott/ga-0063.htm.*

During the 78th Regular Session of the Texas Legislature, the House Committee on Redistricting convened in a public hearing and accepted public testimony on congressional redistricting on six separate occasions at the Capitol. On the first four of these occasions, testimony was exhausted in the sense that the committee remained until all witnesses present were given the opportunity to speak.

Beyond the typical notification and publicity practices of the Texas House of Representatives (in which notices are posted in advance around the

Capitol and on the Internet), extraordinary efforts were used to publicize the May 2 and May 3 public hearings. A memorandum by Chairman Joe Crabb, dated April 30, 2003, was sent to the following mailing lists:

- The Texas Congressional delegation.
- A list of the parties involved in *Balderaus v. State of Texas* lawsuit;
- The Office of Attorney General's list of parties notified regarding Request No. 0017-GA;
- RedAppl clients 2001-2002; and
- The list of parties notified on the 2000 regional redistricting hearings.

Contact was made via certified letter, FEDEX, telephone , fax, email, and/or hand delivery.

Ultimately, the House Committee on Redistricting adopted a map (PLAN 01180C), and the House Committee on Calendars scheduled the floor debate. The congressional redistricting effort ended without a floor debate due to deadlines in the House Rules and a lack of quorum for several days in the House of Representatives.

ii. **Interim Regional Hearings**

On June 20, 2003, Chairman Joe Crabb announced the creation of three subcommittees on congressional redistricting and six regional public hearings in San Antonio, Lubbock, Brownsville, Houston, Dallas, and Nacogdoches.

Beyond the typical notification and publicity practices of the Texas House of Representatives, extraordinary efforts were used to publicize these public hearings. Notices were posted around the Capitol in both English and Spanish. House Administration distributed notice to all House members and staff. The Speaker's Press Office distributed notice to the news media in English and Spanish. And Texas Legislative Council:

- posted notice on the Council's redistricting website in English and Spanish;
- distributed notice to Senators' and the Lieutenant Governor's Capitol mailboxes;
- faxed notice to members of Congress (except Representative Ron Paul, whose office requested e-mail);
- mailed notice to interested parties (Spanish and English

copies were sent to interested Hispanic organizations);

- mailed notice via certified mail to the same list of interested parties;
- faxed Spanish and English copies of the notice to Hispanic media; and
- mailed and faxed notice to Vietnamese media.

At all regional hearings, clerks distributed to the audience handouts entitled "Tools for Redistricting" and "Subcommittee on Congressional Redistricting Rules Governing Operations" in both English and Spanish. Two large maps were on display: (i) the court-drawn map (PLAN 01151C), and (ii) the committee map from the regular session (PLAN01180C). Single-page versions of these maps were also made available to the public.

At all regional hearings, a Spanish-language translator was on hand and made available for members of the public. In addition, at the Houston regional hearing, a Vietnamese-language translator was on hand and made available for members of the public.

The Lubbock and Nacogdoches regional hearings exhausted testimony

in the sense that committee remained until all witnesses present were given the opportunity to speak.

In Brownsville, one member of the subcommittee left the room before the start of the meeting and refused to make a quorum. In addition, demonstrators disrupted the Brownsville hearings, resulting in less testimony at this hearing. However, the committee's address and fax number were publicized on handouts, and Chairman Joe Crabb repeatedly encouraged the submission of written testimony. Chairman Crabb and the clerks stayed until the published adjournment time of 8 p.m., in an attempt to outlast the demonstrators and resume taking testimony.

A court reporter transcribed each regional hearing.

iii. **First Called Session**

On June 30, 2003, the House Committee on Redistricting convened in a formal meeting to discuss the testimony from the regional public hearings. Public testimony is not allowed at a formal meeting. On July 1, July 2, and July 3, the committee convened in a public hearing and accepted public testimony on congressional redistricting at the

Capitol. At each of these hearings, testimony was exhausted in the sense that committee remained until all witnesses present were given the opportunity to speak. On July 5, 2003, the committee entertained legislator testimony (but not public testimony) and adopted a map (PLAN 01268C).

The House passed this map with no amendments. The First Called Session expired without the Senate voting on map.

iv. **Second and Third Called Sessions**

During the Second Called Session, the House voted to suspend the rules to bypass the committee process and adopted the same map adopted in the First Called Session (PLAN 01268C). No additional public testimony was taken. The Second Called Session expired without action in the Senate due to a lack of a quorum.

During the Third Called Session, the House Committee on Redistricting met in a formal meeting on September 15, 2003. The committee passed the same map as in the First Called Session (PLAN 01268C). Public testimony is not allowed at a formal meeting. In addition, the committee passed House Resolution 43 clarifying that prior testimony, information, debate, and

remarks are part of the legislative history of House Bill 3, 78th Legislature, 3rd Called Session. Both the map (PLAN 01268C) and the resolution passed the full House later in the week.

v. **Publicity in the Media and on the Internet**

The media coverage of the redistricting process has been extensive. Over 1400 articles from print media are compiled on a CD-ROM that is included with the submitted materials.

The web site of the Texas House of Representative (*http://www.house.state.tx.us/welcome.php*) among other things, announces the schedules for committee meetings and floor debates; provides minutes, journals, and broadcast archives; and publishes the status of legislation.

The Texas Legislative Council web site (*http://www.tlc.state.tx.us/research/redistr/redist.htm*), which can be reached through a link from the House web site, has a dedicated area to redistricting, which provides:

- news, including announcement of hearings (often in Spanish as well as English);
- information on all published maps, by legislators or the public;
- a history of redistricting; and
- census and district demographics and statistics.

vi. **Submitted Materials**

The submitted materials include the following:

- the extraordinary notice and postings, in both English and Spanish;
- two memoranda from Texas Legislative Council with contact information of the interested parties and the media;
- handouts from the regional public hearings, in both English and Spanish;
- minutes for all committee meetings, including the subcommittee public hearings;
- witness lists for all public hearings where public testimony was taken;
- House Resolution 43;
- Witness Affirmation Forms for those who did not testify;

- all written testimony submitted to the committee;
- the collected and indexed correspondence of the House Committee on Redistricting, including the interactions with Attorney General Greg Abbott and OAG Opinion Committee Chair Nancy Fuller.
- transcripts of the regional hearings; and
- CD-ROMs containing press clippings.

The video broadcast archives for the public hearings at the Capitol, as well as the audio archives and transcripts for the regional public hearings, are available on the internet at: *http://www.house.state.tx.us/committees/redistricting.php*.

(g) Availability of Submission.

The follow notice has been submitted to the Texas Register for publication and will appear in the October 31, 2003 issue; it will also be placed on the Texas Secretary of State's website:

The State of Texas has submitted its redistricting plans for Texas Congressional Districts, to the United States Department of Justice for its review under Section 5 of the federal voting Rights Act, 42 USC § 1973c. A complete duplicate copy of the submission

is available for public review in the Office of the Secretary of State, Elections Division, 208 E. 10th Street, Suite 309, Austin, Texas 78701. (800) 252-VOTE (8683). The information will be available from 8:00 a.m. to 5:00 p.m., Monday through Friday. any comments regarding the submission may be sent to:

Chief, Voting Section
Civil Rights Division
Department of Justice
Room 7254-NWB
950 Pennsylvania Ave., NW
Washington, DC 20530

Thank you for expediting consideration of this important request. If you have any questions or need additional information, please contact Mark McHargue, Staff Attorney, Elections Division, at (512) 463-5650 or Don Willett, Deputy Attorney General for Legal Counsel, Office of the Texas Attorney General, at (512) 936-1884.

Sincerely,

Geoffrey S. Connor

Enclosures

GSC:AM:MM:id